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October 19, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

William F. Caton, Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Ex Parte Presentation
General Docket No. 93-252 and CC Docket No. 94-54

Dear Mr. Caton:

The purpose of this letter is to have the record reflect that Kevin McAllister and Steve Muir, the Vice President and Treasurer, respectively, of the Cellular Resellers Association, Inc. met with the following Commission personnel to discuss pleadings filed by the Cellular Resellers Association, Inc. and ComTech Mobile Telephone Company in the above-referenced dockets:

Ruth Milkman, Legal Advisor to the Chairman;
Rudy Baca, Legal Advisor to Commissioner Quello;
Lisa Smith, Legal Advisor to Commissioner Barrett;
Commissioner Chong and David Furth, her Legal Advisor;
Commissioner Ness and her Legal Advisor, Mary McManus;
Gregory Rosston, Deputy Chief of the Office of Plans
and Policy;
Regina Keeney, Chief of the Wireless Telecommunications
Bureau;
Jackie Chorney, Legal Assistant to the Chief of the
Wireless Telecommunications Bureau;
John Cimko and Michael Wack, the Chief and Deputy

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Chief, respectively, of the Policy Division of the
Wireless Telecommunications Bureau; and
Lawrence Atlas, Associate Bureau Chief of the
Wireless Telecommunications Bureau

Each of the above-named persons was later given copies of
the attached letters from CRA and the Utility Consumers' Action
Network.

Sincerely,

KECK, MAHIN & CATE
Attorneys for Cellular Resellers
Association, Inc.

By: 
Lewis J. Paper

cc: The Honorable Susan Ness
The Honorable Rachelle B. Chong
Ruth Milkman
Rudy Baca
Lisa Smith
David Furth
Mary McManus
Gregory Rosston
Regina Keeney
Jackie Chorney
John Cimko
Michael Wack

California Resellers Association, Inc.

October 6, 1995

The Honorable Joe Barton, Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
2323 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Barton,

The purpose of this letter is to set forth the views of the California Cellular Resellers Association, Inc. (CRA) concerning the importance of resale in the provision of cellular service, Personal Communications Services ("PCS") and other mobile communications services.

The CRA represents numerous cellular resellers throughout the State of California who provide service to more than 100,000 subscribers. CRA members have been providing cellular service for more than ten years and have substantial experience in the marketplace, in administrative proceedings before the California Public Utility Commission and the Federal Communications Commission ("FCC"), and in legislative proceedings before the State legislature in Sacramento as well as before Congress.

CRA's experience underscores the importance of congressional laws and FCC policies which allow for ease of entry, interconnection of facilities and the prohibition of unreasonable discrimination by FCC-licensed cellular carriers and other providers of Commercial Mobile Radio Services ("CMRS").

Resale has been a fundamental cornerstone of FCC policy for almost twenty (20) years. Consumers throughout the country have benefited from that policy in the provision of long distance telephone service as well as in the provision of cellular telephone service. Resale policies facilitate the entry of new competitors -- especially small businesses who might not otherwise have the opportunity to participate in capital intensive industries -- and thus provide new competition in markets that would otherwise be dominated by a few very large carriers. The introduction of competition from resellers helps to ensure better service at lower rates, reduces the need for government regulation, and encourages innovation in technology, marketing, and service.

The introduction of PCS will not eliminate the need for resale in cellular, PCS, or other CMRS technologies. Resellers can and will continue to act as a marketplace check on excessive rates and discriminatory practices. That competitive check is particularly necessary since


PCS, like cellular, will be dominated -- especially in the early years of development -- by large carriers who can and may engage in anticompetitive activities. And, in any event, resale can only survive if resellers are able to provide better service at lower rates.

If resale is to be eliminated, then, it should be through the operation of marketplace forces and not government fiat. Indeed, any governmental proscription against resale would require governmental representatives -- no matter how well intentioned -- to second guess the operation of marketplace forces which vary from state to state and are always fluid. A government that hails the benefits of a free market environment should not adopt laws or policies which artificially restrict the forces that can operate in that environment.

If your subcommittee desires additional information concerning the experience of CRA and its members, please contact me at 619-944-3434.

Sincerely,

Cellular Resellers Association, Inc.

By: 
Kevin McAllister,
Vice President

Utility Consumers' Action Network

UCAN
1717 Kettner Blvd., Suite 105
San Diego, CA 92101-2532
619-696-6966

October 9, 1995

Congressman Joe Barton
Chair, Subcommittee on Oversight & Investigation
House Commerce Committee
2125 RHOP
Washington, DC 20515

VIA FAX AND HAND DELIVERY

RE: October 12, 1995 Written Testimony by UCAN

Dear Congressman Barton,

Thank you for the opportunity to present UCAN's experiences and views on the issues surrounding the cellular industry. UCAN regrets that it is unable to send a representative to appear before your committee on Tuesday. However, as our Executive Director, Michael Shames, indicated to your aide, should you desire our participation via telephone or teleconference, we will be honored to oblige.

INTRODUCTION

UCAN is a San Diego based non-profit consumer protection organization. Our objective is to insure that ratepayer interests are protected in proceedings before the California Public Utilities Commission and California Department of Insurance. UCAN also serves as a consumer "watchdog" and educational resource within the community on utility and insurance issues.

UCAN is supported by the contributions of its members, by intervenor compensation and assorted grants. Our membership is made up primarily of senior citizens and other individuals on a fixed income. UCAN is overseen by a 13 member volunteer Board of Directors. Its staff is composed of three full time attorneys and two part time office assistants.

UCAN was established in 1984 in reaction to the string of rate increases imposed on San Diego consumers by San Diego Gas & Electric. During UCAN's first ten years we established ourselves as an effective consumer advocate, representing consumer interests within regulated industries, such as power utilities and telecommunications, including cellular service.

On the issue of cellular, UCAN has been a strong proponent of accurate customer service information, truth in advertising and development of effective competition in this rapidly expanding industry. UCAN was an active participant in the "bundling" proceedings before the CPUC in 1994. Also in 1994, UCAN successfully challenged one of California's two cellular carriers before the CPUC. This challenge resulted in over a quarter million dollars being returned to customers stung by that carrier's anti-consumer practices.

At the local level, UCAN has served, and continues to serve, as the only resource for accurate and unbiased cellular information for consumers. UCAN recently conducted a survey of cellular service and sales practices in the San Diego area. Accurate information on cellular service has become crucial since the CPUC approved the practice of "bundling" in April 1995. Sadly, such information has also become scarce in the seven months since the CPUC issued its decision.

BACKGROUND

In March 1994, the CPUC began proceedings to consider whether it should lift its long standing prohibition of "bundling" of cellular. At that time, California was one of the few states which prohibited "bundling", the combined sale of discounted cellular telephone equipment and tariffed cellular service. Protests were filed by a variety of industry and consumer interests, including Cellular Resellers Association, the CPUC's Division of Ratepayer Advocates and UCAN. Despite these protests, the CPUC authorized bundling of cellular equipment and service in April 1995.

The CPUC's goal in allowing bundling was to bring "benefits in the form of reduced prices for cellular equipment" to the consumer. (CPUC D.95-04-028, Page 2). Because the California cellular service market operates as a duopoly, the CPUC acknowledged that direct price competition in cellular service was unlikely; however, it reasoned that the equipment discounts that bundling would provide would allow for an "indirect substitute" for price competition in the service area. (Id.).

The CPUC based its decision, in part, on the following:

- o Because the cellular equipment market is competitive, bundling of cellular equipment and services will not diminish competition in the equipment market. (Id. at 14).

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- o California's below cost pricing laws are part of the bundling decision, so customers and the industry will be protected from such practices. (Id. at 22).
- o Consumer benefits of bundling include lower equipment costs, no adverse impact on cellular service rates and increased consumer choices. (Id. at 34).
- o Competition will develop within each market segment as each participant begins to offer diverse service and product choices. (Id.).

With the authorization of bundling, San Diego consumers have been inundated with "free phone" advertisements. Some dealers are even offering free trips to Las Vegas as part of the deal. In the face of these ads, and after several complaints from local consumers confused by the deals being offered, UCAN decided to review the cellular market in San Diego. In September of 1995, UCAN conducted a survey of San Diego's cellular market to investigate the concerns of our members and to see if the CPUC's expectations had been realized.

The remainder of this testimony will summarize UCAN's findings in its survey. While the CPUC's expectations have not been realized, many of UCAN's worst fears have come to pass in San Diego's cellular sales market.

THE UCAN SURVEY

Methodology

UCAN conducted this survey during the month of September 1995. After reviewing the ads which ran the week of September 11th in a variety of San Diego publications, UCAN sent three staff members to shop for the advertised cellular phones and service. These staff members did not identify themselves as UCAN representatives to the various retailers, cellular dealers or cellular resellers surveyed. Instead, these surveyors presented themselves as ordinary consumers shopping for equipment and service.

Once at the store, the surveyors, two females and one male, looked for the following:

- o Were the products advertised available
- o Cost of equipment with activation and without
- o Was the equipment being offered discontinued or refurbished
- o Cost of activation alone
- o Was additional equipment necessary and, if so, was it included as part of the deal

- o Amount and depth of information offered by the on site staff
- o Were the terms of the sales contract disclosed and explained prior to sale including penalties and additional costs
- o Differences between California's two carriers on rates and service

Recently, several San Diego cellular dealers have begun offering incentives to switch from one carrier to another. UCAN staff also investigated this practice. Specifically, we wanted to insure that these dealers were fully informing consumers of any switching costs and penalties should they decide to change carriers. Staff was also curious to see how accurate the ads promoting this switching were on the incentives being offered. Several dealers were offering free trips and well as accessories for just coming into the store to hear the sales pitch.

UCAN's Findings

1. Prices for Cellular Equipment

- a. There is very little competition on cellular equipment pricing.

The CPUC reasoned that, because cellular equipment pricing was already competitive, bundling would have no adverse impact on that market. However, as UCAN discovered, there is now very little competition on the pricing of cellular equipment. Consumers are faced with little choice on equipment prices regardless of where they go to shop.

Our shoppers were instructed to compare prices on four of the more popular cellular phone models: Motorola 550 "Flip" phone, Motorola Tele TAC 200, NEC P110 and the Mitsubishi 4500 (also sold as Diamond Tel). They were to request pricing information with activation, or "bundled", and as a stand alone purchase.

With activation, all of these models were "free". However, how one defines "free" tends to vary from store to store. The average person views "free" as meaning--"free", no money will change hands for the phone. However, California law requires that state sales tax be calculated on the real cost of the phone; thus, some money will necessarily need to be handed over by the customer to cover tax. Some stores disclosed this, others did not. For those that did not, out shoppers specifically asked "How free is free?". At some stores, they were told of the tax, other sales personnel just reiterated that the phone was "free". Since none of our contact ended in a sale, UCAN could not test those retailers on that point.

Our shoppers were also told to check for prices without activation for the "free" phones. These same phones would cost them the following:

<u>Store</u>	<u>Flip 550</u>	<u>TeleTAC</u>	<u>NEC P110</u>	<u>Mitsubishi</u>
Allstate	\$300	N/A	N/A	Advertised but not avail.
DOW	\$300	\$300	N/A	\$300
Mobilwks	\$300	\$300	\$300	\$300
Wireless Express	\$300	\$300	\$300	N/A
TelStar	N/A	\$300	N/A	N/A
TSA	\$200	\$200	N/A	N/A
Radio Shack	\$350	N/A	\$300	N/A
Cellular Plus	All phones listed: "\$200 to \$300"			
Allstate(2)	All phones listed: "\$250 to \$300"			
Executive	All phones listed: "\$190 to \$300"			
The Good Guys	\$300	\$300	\$300	\$300
Incredible Universe	"\$300 or so"		N/A	N/A
Circuit City	\$350	\$350	N/A	\$389

With few exceptions, the price for these phones are the same whether a consumer goes to a retail outlet or cellular dealer. In addition, even though these are different models with different features, there is little difference in the price.

More disturbing was the disappearance of alternatives to new cellular equipment as a purchase option. Prior to the bundling decision, San Diego enjoyed wide access to refurbished, rebuilt and leased cellular equipment. Our staff requested information on all of these options

and were disappointed to find that such rebuilt/refurbished equipment is becoming scarce. Further, we were intentionally directed away from such options at most of the stores with the admonition: "Why go used when the new phone is free?!".

Such a result is not unexpected. UCAN discovered this same problem in another state which allows bundling--Nevada. Prior to the PUC's April decision, UCAN sent a volunteer to Nevada to survey the effects of bundling on cellular in order to report to the PUC some of the potential costs and benefits of bundling. As UCAN feared, many of the same problems encountered in Nevada are beginning to appear in the San Diego market as well.

b. Prices for unbundled equipment have increased.

The PUC also predicted that bundling would lead to a decrease in the price of unbundled cellular equipment. In fact, just the opposite has occurred. Based on UCAN's survey of cellular prices prior to bundling, today's prices have increased dramatically in the San Diego area.

In May of 1994, the price of a Motorola 550 "Flip" Phone was \$221 with activation, \$246 without at Allstate Cellular. DOW offered the same phone for \$224 with activation, \$249 without. Mobilworks beat both, offering the phone for \$139 with activation, \$154 without. As illustrated by our survey above, these same stores are now offering the same phone for \$300 without activation. True, a customer can get phone for free, but only if they lock themselves in for a full year of service. Prior to April of 1995, that same customer could purchase the phone at half its present cost, with or without activation, and enjoy a month to month contract.

c. California's "Below-Cost" pricing laws are being ignored.

California Business and Professions Code, Section 17026.1 states in pertinent part:

" . . . commissions or rebates regularly earned by the retailer of cellular telephone may be used to reduce cost, provided, that in no event shall the reduction exceed the greater of the following:

(A) Ten percent of cost, as defined in Section 17026

(B) Twenty Dollars (\$20)."

This section, also known as the Connolly Act, mandates that a retailer cannot sell new cellular phones at discounts of more than

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10% or \$20 below their wholesale cost. Under law, retailers can sell or discount used or discontinued models at any price they choose.

While this may be the law, it is not the reality in San Diego's cellular market. Our staff specifically asked all of the retailers surveyed if the phones being advertised and discussed were discontinued or refurbished. In every case they were told the phones were "new" and still in active production. In fact, some retailers specifically marketed their "free" phones as "new", touting the advantages of the "latest" in cellular equipment. Only one retailer, Radio Shack, acknowledged that there was "some kind of law on this". That sales person then indicated that Radio Shack avoided any problems by purchasing in lots. However, the sales person was unclear why that practice was sufficient to avoid any illegal action.

2. Bait and Switch

A concern raised by our experiences in Nevada was the increased potential for bait and switch practices in the sale of cellular equipment. Our staff made a point of bringing the ads into the stores with them to test for this problem.

Our fears were confirmed on the first day of shopping. A salesperson at Allstate Cellular made a point of disparaging the phone being offered and promoted a more expensive phone bundled with a more expensive annual plan. That same store was "out" of the phone advertised, but more than willing to discuss the more expensive model. At other stores, our shoppers were steered away from certain models, again, toward more expensive bundled equipment and plans.

While one obvious example of bait and switch and pervasive high pressure sales practices are not proof of a widespread problem, these experiences affirm UCAN's concern that customers are being lured into retail stores with the offers of an inexpensive phone. Once there, they are faced with an unexpected number of options and "fast talk". While our staff of professional consumers was warned to expect this, the average consumer will be unaware and vulnerable to being intimidated into a more expensive product which they did not intend to purchase and do not need.

3. Sales Personnel are Failing to Disclose Vital Elements of the Sales Contract

Because of our research prior to the survey, UCAN staff was well aware of the contract terms which apply to "free" phones. Most consumers do not have the time, or feel the need, to do that kind of research. Therefore, our staff was instructed to let the sales personnel give as much information as they were willing prior to

asking for specifics. Overall, we found sales personnel unwilling to discuss contract terms in any depth.

There was one glaring exception to this finding. Our lone male shopper had no problem with obtaining information on the contract terms. He was even able to obtain copies of the contract at stores which had refused both female shoppers' identical request. While this is more a comment on how retailers view male/female customers, and less about cellular sales, the finding was disturbing.

a. Duration of contract and type of plan to be purchased.

All of the free phone deals required that a customer sign up for a full year of service. In addition, many of the stores refused to offer a free phone if the customer was only interested in the lowest price annual plan--generally a "security plan" with minimum usage. In most cases, these details were referred to in extremely fine print on the ads reviewed. However, many ads left out the fact that this was an annual plan and, instead referred to "select pricing plans". Others failed to disclose that the deal was limited to certain plans.

Once in the store, both female shoppers had to specifically ask about the duration of the contract. Some stores were willing to ignore their own ad and offer a free phone with a security plan, others were not. UCAN's male shopper was usually told the duration and plan restrictions at the outset. However, in each case, all of UCAN's shoppers were directed away from the low price plans toward higher priced/usage plans.

b. Penalties.

All of our shoppers found that sales personnel would not bring up the issue of penalties for early cancellation unless specifically asked. Under all of these contracts, free phones are only free for as long as you are signed up for service. In the event that a customer does not fulfill her one year agreement to the service plan, she is obligated to pay the "full value" of the phone and a penalty to the carrier. The carrier's penalty is generally \$100 - \$125 for early cancellation. The penalty paid to the store ranges from giving the phone back to \$400 in "dealer cost".

UCAN firmly believes that this information should be disclosed early in the transaction. However, even at the contract signing stage, such information is hard to find. GTE places its penalty language on the back of the contract in small, unhighlighted print. Of the retail contracts we viewed, which cover the phone, none presented this information in clear or concise language.

c. Unreasonable constraints upon customer flexibility.

UCAN was concerned about the contract terms for a variety of reasons. Among them, the duration of these contracts raises the potential of unreasonable constraint on customer flexibility and, thus, development of competition in the industry.

Cellular, like most telecommunications technology, seems to be changing daily. One year in this industry can see the development of a variety of new phones and other technology. Further, with more customers entering this market, prices for services should conceivably come down and new services should be developed. To lock a customer into a contract with a possible \$525 penalty clause effectively prevents that customer from, not only moving along with the industry, but becoming a force which moves the industry along toward improved prices and services.

In the coming months, UCAN expects rate decreases in cellular service. However, these rate reductions may not be made available to customers locked into a full year contract. While California's two carriers may have initially found this a great idea and a viable solution to customer churn (disconnections) it now appears that the annual contract requirement may back fire on them.

As indicated above, San Diego is beginning to see retailers and dealers offering incentives to switch carriers. But what about the penalties for breaking a one year contract? Both of the retailers presently using this tactic promise to pay the carrier's penalty. However, when our shopper raised the problem of her "free" phone which would cost her about \$300 if she quit, neither store would cover that. Both offered her another "free" phone instead with the instruction that she might just give her other phone back. That may be a viable option with some retailers, but not all. Thus, while the penalty imposed by the carrier may be addressed, many consumers are stuck and unable to switch because their "free" phone will end up costing twice what it would have last year, prior to bundling. Yet again, the lure of the free phone is being used to prey on the uninformed consumer.

4. Lack of Differences Between California's Two Cellular Carriers on Either Price or Services

The PUC speculated that, with the advent of bundling, California's two carriers would begin competing with new services as more consumers entered the market. Even the PUC was not so naive as to

believe that the carriers would begin to compete on rates, but it reasoned that new services and decreased phone prices would make up for this shortcoming. The Commission's expectations have yet to be met.

California's two cellular carriers, GTE Mobilnet and Air Touch, offer substantially the same programs. Where annual plans differ, there is at most a 20 minute difference in calling time. However, that is accompanied by an additional \$10.00 monthly charge. Both offer roaming, 611 service, call waiting, conference calling and call forwarding.

Just to make sure UCAN did not miss anything in its review of each carriers' marketing material, our shoppers specifically asked about differences between the carriers at each store. The general reply was "no difference". Where sales staff were able to name some distinguishing features, they were limited to GTEC's subminute billing and vague references to "technological superiority". Although one cellular retailer made a point of extolling Air Touch's superior roaming capabilities.

5. Comparison Shopping is Impossible

UCAN has traditionally been an opponent of bundling; not just in cellular, but a variety of other industries. Its main concern with this practice is that it makes comparison shopping impossible. Further, bundling tends to divert attention away from monthly rates, thus decreasing market pressure to bring rates down and costing consumers more in the long run. Price and quality signals are muddled and competition is hindered when consumer can not readily comparison shop.

Comparison shopping is impossible in cellular with the introduction of bundling. In a traditional market, a customer might normally shop for a phone and service that meets their individual needs. Once their needs were assessed, they could then begin shopping for the best price/service mix to meet those needs.

With bundling, the consumer is faced with a "take it as is or leave it" proposition. While the phone may meet their needs, the service is too much/too long or vice versa. With all of the stores in the area essentially offering the same deals, choice is further limited. Should that individual wish to bypass the package deals and buy a phone and service separately, they are now compelled to pay more for the equipment than was required a year ago. The sales practices outlined above only complicate the process further.

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a. Limitations on customer choice.

A disturbing trend found by our shoppers was the difficulty in locating alternatives in both equipment and service options. Limitations of choice in equipment and prices is outlined above. UCAN had expected that outcome. What we had not expected was the difficulty in locating resellers and independent agents of cellular services. UCAN staff was only able to locate one cellular reseller via advertising. In desperation, we resorted to professional contacts to locate others. The average consumer does not participate in proceedings before the CPUC which provided those contacts.

Both cellular resellers and independent agents provide a valuable service to both the consumer and the industry. Both offer yet another shopping option, thus increasing customer choice and encouraging competition on price and service. Resellers are able to provide service at a substantial discount, generally 10% - 20% less than purchase directly from the carriers. Independent agents offer individual attention and service which tends to be absent from the retail experience.

Because of the difficulty in locating cellular resellers and independent agents in our area, UCAN was unable to conduct an indepth assessment of resellers and independent cellular agents. According to some sources, the disappearance of these providers is related directly to bundling. Because retailers and dealers are able to bundle, and are doing so below cost, they are receiving the lion's share of the cellular business. In addition, carriers pay many retailers well for bringing in new business; commission's not available to resellers or, generally, to independent agents. The result: few if any resellers or independent agents have the financial ability to offer free phones which cellular dealers and retailers possess. In addition, with the pervasiveness of this "free phone" advertising, few consumers are willing to pay for a phone, even when coupled with a lower monthly rate. With two formally viable (and visible) cellular outlets beginning to fail, consumer choice is limited even further.

CONCLUSION

While UCAN's initial intention was to discover hazards and better prepare consumers as they attempt to shop for cellular service, a disturbing byproduct of our survey was to confirm our doubts about the practice of bundling. Overall, we discovered that the cellular market in San Diego has not been helped by this practice and, in fact, has been harmed. Prices for equipment have gone up, the

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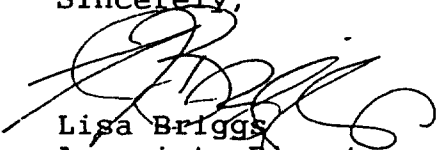
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ability to shop for a better price has been eliminated and customer choice has been removed. Further, retail practices under the new bundling rule have deteriorated from the consumers' perspective.

Lack of customer choice and information is endemic in this industry. UCAN has attempted to step in and fill the need for information by working to educate San Diego consumers. However, UCAN is aware that the problems found in San Diego are not unique but occur nationwide. Therefore, any solution to these issues must be nationwide as well.

Thank you again for this opportunity to present our findings. Should you have any questions or require further information, please do not hesitate to contact the UCAN office.

Sincerely,



Lisa Briggs
Associate Director and
Telecommunications Staff Counsel
Utility Consumers' Action Network